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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

The ABC Television Affiliates Association, the CBS Television Affiliates Association and the NBC Television Affiliates Association (together, the "Network Affiliated Stations Alliance" or "NASA") hereby submit their comments in response to the Further Notice of Proposed Rule Making in the above-referenced dockets.[1/] NASA submits that the Commission should adopt its proposed "equity or debt plus" attribution rule so that, under certain circumstances, program suppliers' otherwise non-attributable equity and/or debt interests in licensees will be attributed.

Current attribution standards enable networks to obtain "less-than-controlling" interests in affiliated stations which are not counted towards the television station ownership limits.

1/ Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy, *Further Notice of Proposed Rule Making*, MM Docket Nos. 94-150, 92-51 and 87-154, rel. Nov. 7, 1996 ("*Notice*").

These interests give networks significant influence over affiliates' broadcast operations and thereby allow networks to evade the intent and spirit of the Commission's ownership rules. The "equity or debt plus" rule will help restrain networks by limiting their ability to influence or control programming decisions of affiliated stations. The new rule also will help to preserve localism, one of the Commission's most important public policy goals.

I. Networks May Use Non-Attributable Ownership Interests to Evade the Policies Behind Broadcast Ownership Rules and Localism.

Networks possessing less-than-controlling ownership interests in affiliated stations nevertheless are able to exert considerable influence over affiliates' core operating decisions. It is precisely this kind of influence that the attribution rules are intended to address.[2/] While networks with non-attributable interests may be in technical compliance with the Commission's broadcast ownership rules, the Commission's current attribution standards contain exceptions that allow networks to influence affiliates in a manner that is inconsistent with the underlying principles of the ownership rules. Indeed, the combination of less-than-controlling interests and network affiliation gives a network undue influence over a licensee's operations.

Networks avoid attribution with less-than-controlling interests in several ways. For example, networks may acquire less-than-controlling interests in stations under the "single majority shareholder" exception to the rules. Non-voting stock and other non-voting instruments such as options or warrants are other interests that networks may acquire without attribution. These arrangements are the subject of understandable concern because they create relationships

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2/ BBC License Subsidiary L.P., *Memorandum Opinion and Order*, FCC 95-179, rel. Apr. 27, 1995, separate statement of Commissioner Ness at 1.

between networks and licensees that allow networks to influence important licensee programming and operational decisions. Such relationships undermine the policies behind the attribution rules because, as Commissioner Ness has noted, the attribution rules are concerned with ownership interests that provide entities with "the ability to influence, not control."[3/]

Less-than-controlling interests confer influence on networks in several ways. First, network investments create fiduciary obligations on the majority owner that might require the owner to favor the network. Networks also gain influence over licensees by obtaining long-term affiliation agreements as a *quid pro quo* for their investments in licensees. Fox's prior, pre-acquisition relationship with New World is illustrative. After Fox acquired non-voting stock interests in New World, all of the New World television stations became Fox affiliates. Affiliation agreements can contain terms that include significant financial disincentives to carry local programming or contain other provisions that inhibit an affiliate's flexibility to carry non-network programming during times when the networks provide programming. The willingness of an affiliate to accept those terms in affiliation agreements is likely to be influenced by any financial interest the network holds in the affiliate. Given the effects of network ownership and the use of investments to gain affiliations, less-than-controlling network ownership of a station is functionally equivalent to an attributable ownership interest. In many cases, because of the dependency of affiliates, the network may have significantly more influence than a typical attributable owner.

The networks recognize the benefits gained by less-than-controlling interests in affiliates and, consequently, have exploited exceptions in the attribution rules. Before Congress increased

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3/ *Id.*

the ownership limits, the networks used these exceptions extensively.[4] Since the Telecommunications Act of 1996, the networks have increased their attributable interests rapidly, so that they again are approaching the thresholds. For instance, CBS now owns stations with coverage of more than 31 percent of the country and Fox owns stations with more than 34 percent coverage.[5] Now that they are reaching the new ownership limits, the networks have every reason to exploit once again the exceptions to the attribution requirements. Indeed, when Fox's minority interests are attributed, Fox has ownership and other interests in 28 stations with a collective coverage of more than 37 percent of the nation.[6]

The networks' ability to influence the operation of more stations than the ownership rules otherwise would permit has a significant negative impact on the Commission's longstanding policy favoring localism. Localism is one of the Commission's most important policy goals because it is the policy that supports broadcasters' decisions to tailor their programming to the specific needs of their communities of license. The Commission repeatedly has expressed its interest in localism in its decisions.[7] Congress likewise acknowledged the importance of local

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4/ *See* comments of NASA, MM Docket No. 94-150, filed May 17, 1995.

5/ A chart identifying the current interests of ABC, CBS, NBC and Fox, based on publicly-announced transactions, is attached as Exhibit 1. The percentages on this chart were calculated in accordance with the Commission's methodology which counts only half the coverage of UHF stations.

6/ Without the UHF discount, Fox's coverage would be more than 40 percent.

7/ *See, e.g., Report on Chain Broadcasting*, Commission Order No. 37, Docket 5060 (1941), *modified, Supplemental Report on Chain Broadcasting* (1941), *appeal dismissed sub nom. NBC v. United States*, 47 F. Supp. 940 (1942), *aff'd* 319 U.S. 190 (1943). *See also* Review of the Commission's Regulations Governing Broadcast Television Advertising, *Notice of Proposed Rule Making*, 10 FCC Rcd 11853 (1995).

broadcast stations when it adopted must-carry rules in the 1992 Cable Act.[8] Localism increases coverage of locally-significant events, such as charity telethons, local elections and local news. Localism also allows licensees to exercise discretion and reject network programming that may be unsuitable for their communities.[9] For example, CBS-affiliated stations recently decided not to air *Public Morals*, a controversial sitcom, unless significant changes were made to the program.[10] Apparently, these stations concluded that the program was inappropriate for their communities.

Networks have no significant incentive to advance or even accommodate localism because their economic interests are best served if affiliates carry all network programming. Network advertising revenues increase if more network programming is aired. Network revenues are maximized if every network program is aired by every affiliate.

As networks gain more influence over station operations, they increasingly will be able to impose their programming preferences on affiliates, to the detriment of localism and the public interest. In light of these concerns, the Commission should act to prevent networks from unduly influencing local affiliates' operational decisions and denying communities the local non-network programming determined by affiliates to best meet the needs of their audience.

8/ *See* 47 U.S.C. § 534.

9/ Indeed, it provides the basis for many of the Commission's rules, including the right-to-reject rule. *See* 47 C.F.R. § 73.658(e).

10/ Tom Shales, *'Public Morals': Rank and Vile Cops*, WASHINGTON POST, Oct. 30, 1996.

II. The New National Ownership Cap Is Meaningless If Networks Are Able to Influence Affiliates With a Nationwide Audience Reach That Exceeds the Cap.

The Commission recently amended its television ownership rules to raise the national television audience reach cap from 25 percent to 35 percent. The new cap, mandated by the Telecommunications Act of 1996, allows networks to obtain more ownership interests nationwide in broadcast licensees. Despite this relaxation of the ownership rules, Congress plainly intended the cap to establish a meaningful and straight forward limit on entities' television ownership interests. This limit is meaningless if networks are able to influence the programming decisions of affiliates reaching a nationwide audience that exceeds the cap.

If the cap is to have any meaning, it must limit all ownership interests that enable networks to influence the operations of affiliated stations. Including less-than-controlling but nevertheless influential interests in ownership calculations would allow the Commission to enforce the cap and use an "honest number" that reflects the networks' actual level of influence. The Commission should allow networks to obtain influential interests in affiliated stations up to permissible limits, but should not allow them to use the attribution rules to evade the intent of those limits.

III. The Commission Should Adopt the "Equity or Debt Plus" Attribution Rule So That Networks' Less-Than-Controlling Interests Will Be Attributed When Necessary.

Given the level of influence conferred on the networks by their less-than-controlling interests in affiliated stations and the importance of a principled national ownership limitation, the Commission should take steps to restrain the networks from increasing their influence and, at the same time, avoid attribution. The Commission can curb such efforts by adopting the "equity or debt plus" rule and attributing otherwise non-attributable interests in a licensee where the interest holder is a significant program supplier.

The attribution rules are intended to treat an entity as an owner whenever it has the ability to influence a licensee's behavior, not merely when an entity has control.[11/] Rules that do not recognize entities with the power to influence licensee actions will not achieve the underlying goals of attribution. Therefore, any new attribution rule adopted by the Commission should recognize less-than-controlling interests that allow networks to exert significant influence over affiliated stations' key decisions.

The Commission should apply the "equity or debt plus" test to significant program suppliers. For this purpose, "program suppliers" should include only networks, as defined by the Commission's rules,[12/] and other suppliers that provide substantial quantities of programming to licensees. This standard recognizes that influence is a function of how important a program supplier is to a station. Unlike networks, which can supply up to 75 percent of an affiliate's programming, most program suppliers provide less than 10 percent of a typical customer's programming. There is little reason to be concerned about such programmers because their potential influence is relatively modest, even if they hold non-attributable interests in the

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11/ That is why there are different thresholds for attributing active and passive interests. *See* Corporate Ownership Reporting and Disclosure by Broadcast Licensees, *Report and Order*, 97 FCC 2d 997 (1984), *recon. granted in part, Memorandum Opinion and Order*, 58 RR 2d 604 (1985), *further recon. granted in part, Memorandum Opinion and Order*, 1 FCC Rcd 802 (1986).

12/ A "television network" is defined as "any person, entity, or corporation providing on a regular basis more than . . . 15 hours of prime time programming per week . . . to interconnected affiliates that reach, in aggregate, at least . . . 75 percent of television households nationwide; and/or any person, entity, or corporation controlling, controlled by, or under common control with such person, entity, or corporation." 47 C.F.R. § 73.662(f).

stations. However, affiliates depend on networks for large parts of their broadcast day, and this relationship severely diminishes affiliates' ability to make independent programming decisions. Consequently, it is appropriate to recognize the level of influence a network wields when it combines affiliation with otherwise non-attributable interests. Adopting the "equity or debt plus" rule would properly recognize this influence.

IV. Conclusion

Networks are able to take advantage of loopholes in the Commission's current attribution standards by using less-than-controlling interests to exert influence over affiliates. The attribution rules should be revised so that these interests are counted towards television ownership limits and so that the independence of local stations' programming and operational decisions is protected.

For these reasons, the Network Affiliated Stations Alliance urges the Commission to adopt rules that are consistent with these comments.

Respectfully submitted,

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February 7, 1997

CERTIFICATE OF SERVICE

I, Tammi A. Foxwell, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 7th day of February, 1997, the foregoing "Comments" were sent via hand delivery to the following:

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